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IN THE

Supreme Court of the United States

October Term, 1959

No. 662

ROBERT CUSHMAN MURPHY, MARJORIE SPOCK, MARY T. RICHARDS, JOHN C. HOMER, GLADYS WEEKES, DAVID KENSEIMY, FRANCES P. BERENS, MARY JACOBS, ARCHIBALD B. ROOSEVELT, CHARLES BANKS BELT, FRANK C. REUSCHLE, ELSA REUSCHLE and JANE N. NICHOLS,

Petitioners,

—vs.—

EZRA TAFT BENSON, Secretary of Agriculture of the United States,

Defendant,

and

LLOYD BUTLER, Area Supervisor, Plant and Pest Control Division of the United States Department of Agriculture, and DANIEL CAREY, Commissioner of Agriculture and Markets of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1959

No.

ROBERT CUSHMAN MURPHY, MARJORIE SPOCK, MARY T. RICHARDS, JOHN C. HOMER, GLADYS WEEKES, DAVID KENNEDY, FRANCES P. BERENS, MARY JACOBS, ARCHIBALD B. ROOSEVELT, CHARLES BANKS BELT, FRANK C. REUSCHLE, ELSA REUSCHLE and JANE N. NICHOLS,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Robert Cushman Murphy and the other petitioners above named pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on October 1, 1959.

Citations to Opinions Below

The opinion of the District Court for the Eastern District of New York (printed at R. 313a) is reported in 164 F. Supp. 120. The opinion in the District Court denying plaintiffs' motion for preliminary injunction (printed at R. 1b) is reported in 151 F. Supp. 786. The opinion of the Court of Appeals, dated October 1, 1959, is printed at page 9a of Appendix B hereto, but has not yet been reported.

Jurisdiction

The decision and judgment of the Court of Appeals were filed on October 1, 1959 (App. B. p. 9a). Petition for rehearing was filed on October 16, 1959, and was denied on October 30, 1959. No extension of time to petition for certiorari has been requested or granted. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. Where defendants embark upon alleged trespasses after the commencement of an action to restrain them, from which plaintiffs sustain substantial and inevitable damages, not readily susceptible of expert pecuniary admeasurement, may the plaintiffs be deprived of a judgment, pro or con, on the merits, by dismissing the prayer for injunction as moot, and refusing incidental damages, merely because it is held that the *plaintiffs* have not established the likelihood that defendants will continue their trespasses?

2. Does the mere fact that Plaintiffs did not show the *amount* of their damages in an equity injunction suit but asked for incidental damages in their complaint, which damages were admitted to be inevitable and were shown by undisputed testimony, justify the Court of Appeals in refusing to adjudicate the constitutional questions and the important public issues involved?

3. Do the Secretary of Agriculture or his agent and the New York Commissioner of Agriculture and Markets, or either of them, have any authority under Title 7, U.S.C., section 147a, and section 164 of the New York Agriculture and Markets Law, to take any measures whatsoever in the State against the gypsy moth or other forest insect, in view of section 58 of the New York Conservation Law?

4. Did the Court of Appeals err in ignoring plaintiffs' appeal from the order denying their motion for adequate findings as to the alleged trespasses and damages?

5. Where it is admitted that in spraying DDT-in-kerosene from low-flying multi-engine planes upon uninfested dairy pastures, villages, kitchen gardens, small ponds and the persons of protesting citizens the defendant federal and state officers are violating the instructions of the United States Department of Agriculture, are not the plaintiffs, upon the claimed cessation of such spraying, entitled at least to an adjudication of their legal and constitutional rights as of the commencement of their injunction action, and as to the extent and nature of their damages therefrom, and to at least nominal damages, even though said damages are not susceptible of expert pecuniary admeasurement?

Statutes Involved

The statutory provisions involved are U.S.C., Title 7 (Agriculture Act), Section 147a (1958), 58 Stat. 735 (App. "A" p. 1a); N. Y. Agriculture and Markets Law, Section 164 (id. p. 5a) and N. Y. Conservation Law, Section 58 (id. pp. 2a to 5a); also, if construed as the defendants-appellees and the District Court have construed them, the question of the *validity* of the first two of those statutes under the Fifth and Fourteenth Amendment of the Constitution of the United States is also involved (printed in Appendix A, at p. 7a).

Statement

The plaintiffs-appellants (petitioners), thirteen residents of Long Island, in the State of New York, commenced this injunction action on May 8, 1957, in the United States District Court for the Eastern District of New York, against Lloyd Butler, area supervisor of the U. S. Department of Agriculture ("USDA") and Daniel Carey, Commissioner of Agriculture and Markets of the State of New York, to restrain the threatened air-spraying of a poisonous insecticide known as DDT, dissolved in kerosene, upon their persons and admittedly uninfested lands, for the announced purpose of eradicating a forest insect known as the gypsy moth (compl't, R. 13a). Judge Byers denied plaintiffs' motion for preliminary injunction and defendants' motions to dismiss, and ordered a prompt trial on the merits (151 F. Supp. 786, R. 9b).

Prior to the commencement of the action the defendants had publicly announced that the area to be sprayed was to be the entire county of Suffolk, and the eastern half of

Nassau County, by the federal Department of Agriculture under a co-operative agreement with the New York Commissioner, and Department, of Agriculture and Markets (R. 31a, 32a and 33a), pursuant to Section 147a of the Agriculture Act (Title 7, U.S.C.) and Section 164 of the New York Agriculture and Markets Law.

Section 147a (set forth in Appendix "A" hereof) authorizes the Secretary of Agriculture, in cooperation with states, to carry out operations or measures to eradicate or prevent the spread of the gypsy moth, but expressly provides that

> "• • • in performing the operations and measures herein authorized, the cooperating • • • State • • • shall be responsible for the *authority* necessary to carry out the operations on all lands and properties within the • • • State • • • ".

The gypsy moth is a *forest* insect. Section 58 of the N. Y. *Conservation* Law expressly confers upon the department, and commissioner, of conservation the authority to enter into cooperative agreements with the federal government for the purpose of control and preventing the spread of the gypsy moth; and discretionary authority to poison *forest* areas in and near sections infested by the gypsy moth (App. "A", p. 3a).

The plaintiffs contended in the district court (R. 325a, 342a, 344a) that the state's power, by cooperative agreement, to give to the federal government the authority respecting gyspy moth measures required by Title, U.S.C. Section 147a, can be exercised *only* by the New York Commissioner of *Conservation*, as expressly granted by the New York statute; that such a power must be exercised

by the legislature or by an officer or body expressly authorized by it; that no such power, respecting the gypsy moth or other *forest* insect, has been granted to the Commissioner of Agriculture and Markets by the New York legislature; that section 164 of the N. Y. Agriculture and Markets Law does not even *imply* such power because it relates solely to insects and diseases injurious to *plants* and to their hosts; and that it is fundamental in New York law that an administrative function may be bestowed upon only *one* of the civil departments of the state government (*People* v. *Tremaine*, 252 N. Y. 27, at p. 51; 168 NE 817).

The district court, however, ruled (R. 325a) that the power granted to the Commissioner of Conservation is not exclusive, and (R. 335a) that the defendant Commissioner of Agriculture and Markets has the power to give the cooperative authority to the federal government which is required by 7 U.S.C., Section 147a. It refused to make any findings, pro or con, relevant to that question (R. 343a, 344a) except that the gypsy moth is one of the pests of *forest*, shade and ornamental *trees* (not plants), and not including fruit trees (R. 322a). The Court of Appeals entirely *ignored* this contention and ruling (App. "B", p. 8a).

Several of the plaintiffs, before the spraying and before the commencement of action to restrain it, protested against the spraying of *their* admittedly uninfested premises.

The plaintiffs also contended that even if the defendant Commissioner of Agriculture and Markets had the power to give to the federal government the authority required by Section 147a to take any measures at all against the gypsy moth, Section 164, subdivision 1, of the N. Y. Agriculture and Markets Law, especially in the light of subdi-

visions 2 and 3, cannot be construed as authorizing the mass spraying from the air, not merely of infested *forests*, but of *uninfested* suburban homes, kitchen gardens, villages, congested residential "projects", fruit trees, unoffending *persons*, and especially *dairy* pastures; and that if it is so construed (as the defendants and the district court have construed it) the New York statute is invalid under the 14th Amendment of the federal constitution.

As will be amply shown *infra*, by the testimony of defendants' own witnesses, mass air-spraying over congested suburban areas by multi-engined planes (as distinguished from helicopters) as contemplated and carried out by defendants, *inevitably* renders vegetables, herbs and fruits inedible (because of the kerosene solvent); and *inevitably* deposits measurable, and hence forbidden, quantities of DDT in the soil of dairies, and in the *milk* therefrom (making its sale illegal); frustrates "organic" cultivation; and violates the instructions of the USDA itself, so as to give the deliberate acts of the defendants the character of *trespasses*, without any governmental sanction whatsoever. Such spraying, the undisputed evidence shows, inevitably causes, and did cause, substantial *damage* to several of the defendants and to other residents of the spray area, though not susceptible of expert pecuniary admeasurement.

While the district court found (R. 333a) that

> "• • • the area sprayed • • • comprised • • • all such *wooded* areas in approximately the eastern half of Nassau County • • • "

it said in the Opinion (R. 323a) that

> "• • • admittedly, the spray operation did not contemplate the avoidance of *small* areas."

Nassau County, where most of the petitioners have their homes, gardens, ponds, fruit trees, and bird sanctuaries and some of them pursue "organic" cultivation, is the most densely-populated county (outside of New York City) in the populous State of New York.

While the district court said in its Opinion (R. 323a) that

> "The *claim* that the use of helicopters is feasible for *large* areas is not sustained"

and found (R. 334a) that

> "*Ground* spraying * * * costs twenty-five times more than aerial spraying"

there *was* no claim as to the "feasibility" of helicopters over "large" areas, especially large *forested* areas. The complaint is that, contrary to USDA's own instructions, the defendants use multi-engine planes in spraying kerosene and poisonous DDT, at tree-top height, over *small*, congested, admittedly uninfested, suburban areas and homesteads.

The USDA *practice*, as set forth in its 1952 yearbook (R. 312a) is that only large *forested* areas are sprayed with DDT, against the gypsy moth, by *aircraft*, and that in residential areas, the spraying is done from the ground, by mist blowers or hydraulic sprayers. And in 1957 the required equipment included *helicopters*, admittedly effective, to be used over villages and other narrow-swath areas where precision is required (R. 312a, 233a, 232a).

Yet, as will appear *infra*, the district court refused to make findings, pro or con, as to the *facts* bearing on illegality and damage, and the Court of Appeals refused to require such findings (R. 339a, 343a to 356a).

DDT has been in general use as a pesticide for only a few years, and its long-range effects upon human health are not yet fully known. There was a conflict of medical opinion between defendants' expert witnesses (R. 231a, 232a and 225a), whose opinion was that a spraying at the rate of *one* pound of DDT per acre is not deleterious to the health of the inhabitants, and that of plaintiffs' witnesses (R. 66a, 48a, 92a, 118a, 139a) in whose opinion even *one* pound per acre is deleterious. But there was *no* evidence that *more* than one pound per acre has not a long-range deleterious effect upon human health; and it was undisputed that mass-air-spraying from multi-engined planes inevitably does, and did, deposit *more* than one pound per acre of DDT upon substantial areas (see record citations *infra*). It was also undisputed that many persons *believe* that the spraying of DDT is harmful, and strongly desire that their persons and *uninfested* suburban premises be spared from such spraying. The defendants proceeded with their air-spraying program in May and June, 1957, and admittedly sprayed the uninfested lands of the plaintiffs (Finding No. 14, R. 353a). They then moved to dismiss the action as moot (R. 2923, 2935), which Judge Byers, on July 31, 1957, denied with leave to renew at the trial (R. 3a, 3003a). Defendants served interrogatories seeking particulars of plaintiffs' damages, which plaintiffs answered under oath on Jan. 13, 15, 21, 24 and 31, 1958 (R. 8a).

The action was brought to trial on February 11, 1958, and continued for five weeks, until March 4, 1958. The plaintiffs Belt, Berens, Jacobs, Kennedy, Murphy, Roosevelt, Spock (for herself and plaintiff Richards), and plaintiff Nichols' two witnesses testified at considerable length

as to their damages from the spraying (R. 157a, 200a, 141a, 104a, 38a, 175a, 108a, 196a, 183a and 263a); and numerous other witnesses testified as to similar damages to other residents from the same spraying (R. 90a, 160a, 101a, 110a, 161a, 104a, 88a, 114a, 56a and 136a).

There was extensive testimony on both sides bearing on the alleged public need for the spraying; its objective; its effectiveness; plans for further eradication measures; and as to whether or not damages to health were inevitable under the methods admittedly employed.

After the close of the testimony, but before the case was closed, a public statement was made by the defendant Carey as to the 1957 phase of the spraying, and defendant's future plans, which, upon plaintiffs' motion to re-open and defendants' consent (R. 285a), was admitted in evidence (R. 287a to 289a).

On Sept. 5, 1958, the trial judge, on consent, granted plaintiffs' motion for leave to add certain allegations to the complaint, to conform to the proof, (*not* to serve an amended complaint) (R. 19a *et seq.*)

The trial Judge (Bruchhausen, *D.J.*) filed his opinion on June 23, 1958 (R. 313a), and on September 29, 1958, filed his formal findings of Fact and Conclusions (R. 332a), in exactly the form submitted by defendants (except that he struck out the word "fruit" as a tree attacked by the gypsy moth (R. 332a).

Judgment was entered in the District Court on Sept. 29, 1958 (R. 337a).

Plaintiffs moved, under Rule 52(b), to amend the findings and for additional findings, and to amend the judg-

ment (R. 338a *et seq.*), which motions were denied on Oct. 9, 1958 (R. 355a).

On Oct. 28, 1958 plaintiffs filed their appeal to the Court of Appeals (R. 356a) from both the judgment and the order denying their motion to amend the findings and for additional findings. The appeal was argued on April 21, 1959 and decided on October 1, 1959 (App. B. p. 9a). As to injunctive relief the Court of Appeals said (App. B. pp. 11a, 12a):

> "We find it unnecessary to reach the merits of the plaintiffs' claim for injunctive relief • • • We hold the question of granting injunctive relief to be moot, and direct the dismissal of so much of the bill as seeks such relief."

As to incidental damages the Court of Appeals said (App. B. pp. 10a, 14a):

> "The trial judge held, *inter alia*, that no legal rights of the plaintiffs had been violated, and that the plaintiffs had not shown that they suffered damage by reason of the spraying • • • in any event the plaintiffs are not entitled to damages on the record before us. We agree with the district judge that the plaintiffs have failed to prove what damages, if any, they have suffered by reason of the spraying. • • • The trial record contains no evidence, expert or otherwise, as to the *amount* of damages suffered by the plaintiffs." (Italics ours.)

But in a footnote (App. B. p. 13a) the Court of Appeals referred to the

> "• • • inconvenience and *damage* as widespread as this 1957 spraying appears to have caused • • • incidents of the seemingly unnecessary and unfortunate nature here disclosed."

The District Court failed and refused to make findings, pro or con, as to any of the following facts, each of which was established without dispute by the testimony of *defendants'* witnesses; and the Court of Appeals ignored plaintiffs' appeal from the order denying their motion for such additional findings, viz., the fact that the eradication program "isn't over" (R. 237a); that the spraying did not eradicate the gypsy moth (R. 238a); that it will take several years to determine whether infestations at any of the 37 foci already located still exist (def't Butler, R. 175a); that at least 2 places have been found since the spraying where the moth and its eggs have survived the spraying and it will take several years to determine whether or not there are *other* infested places (R. 233a, 238a); that after a similar spraying in New Jersey 8,000 acres had to be sprayed a second time, and that "it is impossible to predict when plaintiffs' residences and lands will be subjected to DDT again" (R. 210b, 211b).

There was no finding of fact, pro or con, as to whether or not there *is* any "likelihood" of further spraying, but the District Court stated (R. 334a) that "*plaintiffs* (sic) have *failed to establish* the likelihood of further spraying over their properties" (despite *defendants'* "heavy burden" to establish their affirmative defense of mootness, see *infra*).

The District Court also failed and refused to make any findings, pro or con, as to any of the following facts, all shown without dispute by the testimony of *defendants'* witnesses, viz., that defendants were *instructed* by the USDA not to spray over dairy pastures, and that such spraying was a violation of USDA instructions (R. 258a, 260a, 269a); that no attempt is made to avoid dairy pastures unless

they are "*extensive*" (R. 245a); that plaintiff Nicholls' dairy pastures were actually sprayed (R. 333a); that spraying over dairy pastures inevitably results in measurable DDT in the milk (R. 215a); that the presence of measurable DDT in milk is forbidden by federal and state authorities (R. 256a, 301a, 302a, 303a); that the contract required the use of "*helicopters* for precise treatment of very scattered open growth areas and small villages" (Defts.' Exh. Y, R. 223b); that nearly all of the plaintiffs reside in small villages (R. 18a); that by using helicopters over or near villages, dairy pastures, etc. such targets can be avoided without loss of effectiveness (R. 232a, 233a); that helicopters are an effective means of eradication (R. 232a, 233a); but that is not the "way" the defendant Butler sprays (R. 232a); that defendants spray wherever there are trees (R. 1224); in multi-engine planes (R. 238a); that the spraying of villages, kitchen gardens, fruit trees, dairy pastures, small homesteads, etc. is inevitable when multi-engine planes are used (R. 249, 250a, 288); that with multi-engine planes, because of drift, "overlap" and technical difficulties, it is inevitable that more than the announced *one* pound of DDT and one gallon of kerosene will be deposited on substantial areas (R. 249, 250, 288a); that after the 1957 spraying defendant Carey expressed dissatisfaction with the method of controlling flight patterns and programs with the two-and-four-engined planes, and stated that there must be a better method of making sure that the aircraft do not spray one area more than once (R. 288a); that defendant Carey announced after the 1957 spraying that the aerial fight may be resumed next year, and that a few planes would spray heavily wooded areas this year (R. 289a); and that defendants want a year to study things,

though the decision would not be affected by this court case (spokesman for USDA, R. 288a).

Other facts shown without dispute by *defendants'* own witnesses, but which the District Court refused to find, are: the fact that the gypsy moth has infested Long Island for at least 15 or 20 years (R. 245a) yet there has been no substantial defoliation on Long Island (R. 150a, 259a); that after the establishment of its natural enemies, imported from abroad, the gypsy moth, without "eradication", has been under control (R. 242a, 107a, 198a, 40a, 41a); that the objective of the program is the protection of timber in *other* states, as a prophylactic measure (R. 234a); and that the apprehended danger of the extension of the gypsy moth to other states is remote in time (R. 236a); that even one-gallon-per-acre of the kerosene solvent is very deleterious to crops above ground, will "hurt an awful lot of crops", actually "fatal" (Director Turner, testifying as an opinion witness for *defendants*, R. 334 *et seq.* and 63a to 65a); that for at least three months after grass has been sprayed with DDT the hay or clippings should not be fed to livestock (R. 1790, 221a) and animals should not be permitted to graze upon such grass (*id.*); that the drift of DDT on vegetable gardens or fruits might be dangerous (R. 22a).

Besides the foregoing testimony of defendants' witnesses that the spray *inevitably* causes damage to dairy pastures, vegetable gardens and fruits, there was *undisputed* testimony by several of the plaintiffs, as well as by numerous other sufferers in the same spray area as to the damage which the 1957 phase of the spraying actually caused. Yet the District Court refused to make any findings thereon, pro or con, and the Court of Appeals ignored appellants'

appeal from the order denying their motion to require such additional findings. Such *undisputed* testimony, as to damage to plaintiffs-appellants, was as follows:

Plaintiff Belt, active in several conservation societies, maintained a ten-acre bird sanctuary with a four-foot stand of grass, harboring innumerable insects, to attract and feed his bird friends (R. 1317, 1320, 1323, 158a). The DDT sprayed thereon, as intended, poisoned the insects, making them unfit for bird diet and requiring the mowing down and removal of the high-grass sanctuary. The mown grass was rendered unfit for live-stock fodder (R. 221a).

Plaintiff Murphy, a prominent naturalist and scientist (R. 38a, 39a) became interested in mosquito-prevention through certain pond fish (R. 40a, R. 72 *et seq.*), and at considerable trouble acquired and installed in a pond a number of fish of the species Gambusia, known as "top minnows", for a "controlled experiment" (R. 40a). Defendants' planes with DDT came over twice; the gambusiae were killed, and that was the end of the experiment (R. 40a, 41a). (It was admitted that DDT kills fish in very low concentration, R. 252a.)

Plaintiff Roosevelt has 15 acres at Cold Spring Harbor (R. 196a). He wanted to prevent the spraying, but defendants' planes sprayed his property and killed five golden carp (ornamental fish about a foot and a half long, worth $20.00), despite his efforts to save them with fresh water (R. 198a, 199a).

Plaintiff Jacobs and her husband left the city and took a little, quarter-acre place in Nassau County, part of a village "project" with about 50 similar homesteads (R. 1182

et seq.). They had become interested in chemical-free and insecticide-free gardening and fruit-culture (R. 142a) though defendants' counsel (R. 1201) pooh-poohed this so-called "organic" cultivation as a "hocus-pocus fad". Defendants' spray-planes dowsed their premises several times, on two successive days (R. 143a) flying low, almost at housetop level (R. 146a). The oily spray descended upon Mrs. Jacobs and her young children with a strong odor, causing coughing, irritation of eye, nose and throat, lasting a week (R. 144a). It got in the hair and clothes, requiring many washings, ruined the blueberries, strawberries and apples, with a white residue, and discouraged further chemical-free cultivation (R. 145a). (DDT admittedly kills strawberry plants, R. 108a.) No attempt was made to evaluate those damages in dollars-and-cents.

Though the *only* damage-issue raised by the plaintiff Nichols was the threatened, and actual, poisoning with DDT of the soil of her dairy farm, and the milk therefrom, and though the evidence was undisputed, and the prohibited contamination admitted to have been inevitable when the spraying is conducted over or near a dairy farm (R. 215a), the trial court refused to make any finding, pro or con, except the general finding (R. 333a) that the properties of *all* the plaintiffs were sprayed with the mixture. Mrs. Nichols has two pastures, with woods on one side and a few trees along the lake (R. 108a); also a 17-acre field for fodder (hay and corn) (R. 108a). She sells the milk both retail and wholesale (R. 109a). The defendants' planes went over at a height of between 200 and 300 feet (R. 109a). Chemical evidence showed measurable contamination of the *milk* five months after the spraying (R. 292a, 310a, 280a,

Exh. P. 17, 50); admittedly making its sale illegal (R. 301a, 302a, 303a, 304a, Exhs. P. 38 to P. 43). The soil of the dairy was still contaminated ten months after the spraying (R. 279a, Exh. P. 50, R. 310a). No effort was made to evaluate the damages in dollars-and-cents, because the contaminated milk had already been sold before the chemists' analyses showed the contamination; and there was no practicable method of pecuniary admeasurement. The Court of Appeals entirely ignored the dairy-farm issue, though there was similar undisputed evidence as to the DDT spraying of several other dairy farms in the spray area (*e.g.*: R. 57a, 92a, 160a, R. 345 *et seq.*).

Though the defendant Butler admitted (R. 1224) that even in congested areas multi-engined planes, at low altitudes, sprayed DDT-in-kerosene, "wherever there are trees",

> " * * * right and left over populous villages, projects, small householders and so on, whether there are any gypsy moths there or not, or whether there are any fruit trees in bloom or not * * * "

the district court refused to make any findings thereon, pro or con, and the Court of Appeals failed to require such findings.

The plaintiff Kennedy testified, without dispute, that the spraying deposited an oily film on his vegetables; that the leaves turned brown, rotted and fell off. They were grown only for family use (R. 105a, 106a); and no evidence of pecuniary value was offered. The district court refused findings, either as to the injury or the damage.

The same was shown as to the small garden and orchard of the plaintiff Berens, where she raised practically all of

her own vegetables, as well as apples, peaches and other fruits (R. 200a) without the use of chemical pesticides (R. 201a). The planes came over three times, with a smell of kerosene (R. 201a). The taste of the kerosene made the vegetables inedible, with brown spots. Her family didn't eat any of that crop (R. 202a).

The plaintiffs Spock and Richards bought and developed their suburban home for the express purpose of growing as much as possible of their own fruit, vegetables and herbs, free of chemical pesticides and fertilizers, because the plaintiff Richards' health required her to avoid food thus contaminated (R. 184a). Defendants rejected their plea that their place (though innocent of gyspy moths) be spared; and they went to the trouble and expense ($100) of plastic coverings (R. 143a *et seq.*, 189a *et seq.*). The planes passed nearby, but not over, and they removed the coverings; but then the planes did come over, damaged a great many of their vegetables, rasberry and strawberry plants, and withered their fruits (R. 192a). Their soil, though previously free of DDT, was measurably contaminated (R. 187a *et seq.*, Exhs. 24, 25, 46, 49), rendering their place useless for the very purpose for which they acquired and developed it (R. 192a). They had gone to an expense of $13,000, exclusive of their own labor (which contributed materially) in *preparing* their land for chemical-free production of fruit, berries, herbs and vegetables (R. 193a).

Several expert witnesses testified, without dispute, that the spraying of DDT frustrates the cultivation of land for the production of chemical-free food, known as "organic" cultivation (R. 83a, 96a, 124a).

The district court made a "finding" that "the plaintiffs have not *shown* that they have suffered damage" (R. 335a), but refused to make any finding, pro or con, as to whether or not there *was* such damage, and refused to pass, pro or con, on any of the proposed findings submitted by plaintiffs, with record citations as to the *facts* established in detail, by undisputed evidence, as to the damages sustained, both from the kerosene and the DDT, by numerous plaintiffs, and other owners in the spray area (R. 352a to 354a).

In its opinion (R. 323a) the district court said:

> "It would seem that the plaintiffs' major complaint is of *annoyance*, rather than damage • • • Admittedly the spray operation did not *contemplate* avoidance of small areas such as • • • kitchen gardens • • • A number of the plaintiffs' witnesses testified that the spray *did* render vegetables, such as peas and lettuce unfit to eat" (R. 322a).

Reasons for Granting the Writ

Petitioners respectfully submit that a writ of certiorari should be granted herein (a) because the Court of Appeals has decided two important state questions in a way in conflict with applicable state law (see Points I and II); (b) because the Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this court (see Point III); (c) because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision (see Point IV); (d) because the Court of Appeals has rendered a decision in conflict with

the decisions of the Court of Appeals for the Seventh and Ninth Circuits and of this Court on the same matter (see Point V); and (e) because the Court of Appeals has without justification rendered a decision in which it has refused to adjudicate an important constitutional question which has not been but should be settled by this Court (see Point VI).

POINT I

The Court of Appeals has decided an important state question in a way in conflict with state law, by failing to hold that the defendant Commissioner of Agriculture and Markets has no power to authorize the Department of Agriculture to take measures against the gypsy moth in the State of New York.

Unless the Legislature of the State of New York, or some officer empowered by it, has empowered the defendant Carey, the New York Commissioner of Agriculture and Markets, to grant to the Federal Department of Agriculture and its Secretary the authority required by Title 7, U.S.C., Section 147a, to take measures in the state against the gypsy moth, both of the defendants are in the position of *trespassers*, without a semblance of official authority (entirely apart from whether the things admittedly threatened and done by them are trespasses in any event).

The giving by the State to the USDA of the authority required by Section 147a (p. 1a, App. "A") to "take measures" against the gypsy moth on the uninfested lands of

its citizens is a serious matter; and obviously such authority may be given only by the legislature or by some body or official expressly empowered by the legislature to do so. It is an invitation to another sovereign to come in and do things which affect its citizens and their lands and other property.

The appropriate official in Connecticut refused to give the USDA that authority in connection with the same spraying project for the reason that the Connecticut legislature had not authorized it (R. 63a). Although the New York Department of Agriculture and Markets and its Commissioner are expressly empowered by Section 164 of the N. Y. Agriculture and Markets Law (p. 5a, App. "A") to take action respecting injurious insects and *plant* diseases, the New York Attorney General properly advised the Department (App. "A", p. 7a) that, even as to a plant disease, it lacked the power to authorize cooperation with the USDA in the absence of "specific statutory authority", whereupon the statute was amended so as to empower the Commissioner to give the USDA such authority for cooperating in the eradication of the golden nematode, a *plant* disease attacking potatoes and hence a pest with which the *agricultural* power would be concerned. (The amending statute is set forth in Appendix "A", at p. 7a).

But the gypsy moth is not a plant disease, nor an insect affecting agriculture. It is a *forest* insect, and is properly classified as such by the New York statute (App. "A", p. 2a). Section 58 of the N. Y. Conservation Law, as amended (App. "A", pp. 2a, and 4a) expressly grants to the Department of *Conservation—not* the Department of Agriculture and Markets—the power to cooperate with the federal

government with respect to eradicating the gypsy moth and other *forest* insects.

By upholding, in effect, the erroneous ruling of the district court (R. 325a, 335a) that the power rests with the Commissioner of Agriculture and Markets *as well as* with the Commissioner of Conservation, the Court of Appeals is in conflict not only with state statute law as set forth in Section 58 of the N. Y. Conservation Law, but with State case law as expressed by the N. Y. Court of Appeals in *People* v. *Tremaine*, 252 N. Y. 27, 168 N.E. 817. It is reasonable to assume that the New York legislature did not, by general language in Section 164, subd. 1 (App. "A", p. 5a), intend to grant a specialized power to the agriculture department which it explicitly granted to the department in whose domain it naturally falls. Indeed, the New York Court of Appeals says that it *may not be done*: In *People* v. *Tremaine*, (*supra*) the Court said, at page 51:

> "* * * it is clear that administrative functions, other that those temporary in character and special in their purpose, may be constitutionally bestowed only upon *one* of the civil departments of the State * * *."

If the function were held to be exercisable by *both* civil departments, it would make possible the anomalous situation where one, in behalf of the state, might grant, and the other forbid, federal co-operation.

POINT II

The Court of Appeals has decided another important state question in a way in conflict with state law (and other circuits) by refusing to require an assessment of the substantial unliquidated damages or to award even nominal damages.

The gravamen of this action is for injunctive relief. Damages, though demanded in the complaint (R. 17a) are merely incidental. In answer to defendants' demand for particulars of the damages actually sustained (R. 3282, 3285), the several plaintiffs specified said damages under oath in great detail (R. 3378, 3387, 3394, 3406, 3410, 3414, summarized at pages 14 to 19 *infra*).

The voluminous testimony as to the damages actually sustained by plaintiffs, as well as by other inhabitants of the area, had a relevancy beyond the muleting of the defendants in that it supported the allegation as to the *threat* of further damage. We understand that when injunctive relief becomes moot, it is customary to have the *amount* of the incidental damages determined by a master. *Andrus* v. *Berkshire Power Co.*, 147 Fed. 76 (2d Circ.); cert. denied 203 U. S. 596.

The district court, sitting without a jury, was the trier of the facts and might itself have assessed the unliquidated damages, though plaintiffs had asked that they be determined by a master (Summation Brief). Not only did the district court fail to take either of those steps but it refused to make any findings as to the damages of the several

plaintiffs and the Court of Appeals completely ignored plaintiffs' appeal (R. 356a) from the denying order.

The decision of the Court of Appeals is in direct conflict with *Callanan* v. *Keenan*, 224 N. Y. 503, 509, 510; *Burt Olney Co.* v. *State*, 230 N. Y. 351, 356; and with the decision of the Court of Appeals for the 5th Circuit in *Shell Petroleum Corp.* v. *Scully*, 71 Fed. (2) 772; *Roof* v. *Conway*, 133 Fed. (2) 819, at page 827; and *Welton* v. *40 East Oak St. Bldg. Corp.*, 70 Fed. (2) 377, 380 to 383, in failing to afford to the plaintiffs a judgment, pro or con, as to the lawfulness or unlawfulness of the acts of defendants and plaintiffs' rights as they existed at the commencement of the action.

The Court of Appeals itself recognized the substantial and serious nature of the damages caused by defendants' wrongful acts in the following language contained in its footnote (App. "B", 13a) which is, to say the least, astonishing, in view of its brushing aside of plaintiffs' contentions regarding their damages and refusing to require findings thereof:

> "Of course, if complaint is made again, regarding a further spraying program, it would be the duty of the district court to reexamine the proposed practices and procedures for carrying out the spraying in the light of available techniques and aircraft and the circumstances then prevailing. But remote as we believe a possible recurrence of spraying these areas to be, it would seem well to point out the advisability for a district court, faced with a claim concerning aerial spraying or any other program which may cause inconvenience and *damage as widespread as this 1957 spraying appears to have caused.*

to inquire closely into the methods and safeguards of any proposed procedures *so that incidents of the seemingly unnecessary and unfortunate nature here disclosed*, may be reduced to a minimum, assuming, of course, *that the government will* have shown such a program to be required in the public interest."

Had the Court of Appeals said nothing else in its opinion than the above-quoted, it would have furnished the substance for a judgment for an injunction against the defendant officers!

POINT III

The Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court by dismissing plaintiffs' prayer for an injunction as moot merely because of plaintiffs' alleged failure to show the likelihood of further spraying, whereas defendants failed to sustain their heavy burden of proving abandonment of the unlawful acts embarked upon after the commencement of the action.

It is well settled that where allegedly unlawful acts are threatened before, and embarked upon after, the commencement of the action, the burden rests heavily with the *defendants* to establish convincingly that there will be no repetition; and that is especially defendants' burden when, as here, they continue to assert the lawfulness of some or all of the acts. These defendants have recognized that to be their burden of allegation and proof by the affirmative defenses in their answers (defendant Carey, 33a; defendant Butler, 20a).

It was so held by the Supreme Court in *U. S. v. W. T. Grant Co.*, 345 U. S. 629, where the Court said, at pages 632, 633:

> "* * * voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot (citations). A controversy may remain to be settled in such circumstances, e.g., a dispute over the *legality* of the challenged practices (citations). The defendant is free to return to his old ways. This, together with a *public interest* in having the legality of the practices settled, militates against a mootness conclusion. (Citations.) For us to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. * * * The case may nevertheless be moot if the *defendant* can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.' *The burden is a heavy one.*" (Emphasis ours.)

Here the defendants *could* give reliable assurance of abandonment if such were their firm intention; but they do not do so. On the contrary, they *admit* (Popham, R. 2489) that they intend to eradicate the remaining egg masses on Long Island, but have not determined what means will be employed. They admit that the 1957 phase of the spraying has not eradicated the gypsy moth on Long Island, and that *the program is not over* (Burgess, 237a); that two infestations are still present, discovered *since* the 1957 spraying (defendant Butler, 150a; Director Burgess, 237a); and that it will take several years of trapping to determine what *other* infestations still exist (Butler, 175a); and that the spraying has not been fully effective as an "eradication" operation (Butler, 233a; Burgess, 238a).

Defendant Carey admits (288a) that the defendants "want a year to study things".

In *Walling* v. *Hemmerich*, 323 U. S. 37, the Court granted certiorari upon the question of the *legality* of the defendants' acts despite their voluntary discontinuance, the Court saying at page 43:

> "We hold that the case is not moot * * *. Despite the defendants' voluntary cessation of the challenged conduct a controversy between the parties over the *legality* of the split-day plan still remains. Voluntary discontinuance of an alleged illegal activity does not remove the case from the ambit of judicial power (citations). Respondent has *consistently urged the validity* of the split-day plan and would presumably be free to resume. * * * There is thus an actual controversy, and adverse interests." (Reversed and remanded.)

Here there *is* a dispute as to legality; there *is* a public interest; it *is* possible for the defendants to re-engage; and there is *no* "bona fide promise not to resume"; and it does *not* "*clearly* appear that there is no reasonable expectancy of resumption."

The Court will find that in all of the cases in which injunctive relief has been refused because the case has become "moot and academic" the "mootness" resulted from some cause beyond the control of the parties, not, as here, from alleged voluntary cessation by the *defendant*, and that the mootness occurred after judgment and pending appeal. *Mills* v. *Green*, 159 U. S. 561.

Where, as here, interests of a public character are involved, the mere fact that the particular subject matter of the instant cause has expired does not render the case moot.

So. Pac. Term. Co. v. *Interstate Comm. Comm.*, 219 U. S. 498; *Lansden* v. *Hart*, 180 Fed. (2) 679, cert. den. 340 U. S. 824; *U. S.* v. *Trans-Miss. Freight Ass'n*, 166 U. S. 290.

POINT IV

The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision when it based its affirmance of the judgment denying incidental damages in part upon statements unsupported by the record.

The Court of Appeals based its affirmance of the judgment denying incidental damages in part upon a misreading of the record, as follows (App. "B", p. 14a):

> "Further, we think that plaintiffs' counsel, by the conduct of their case at trial and by their amended complaint, clearly indicated an intention to abandon."

Petitioners, in their Petition for Re-hearing (of which nine extra copies have been filed herewith), called the attention of the Court of Appeals to the portions of the record contradicting its above-quoted statement. We herewith make the same demonstration in substantially the same language:

> "(a) Since the original complaint dealt with a mere threat of illegal acts, before their commission, it could not, in the nature of things, have alleged either the sustaining or the extent of damages. It did, however, allege (R. 13a) that plaintiffs owned homes, gardens, organic gardens, and other cultivated lands; (R. 14a)

that the spray will inevitably cause irreparable injury; (R. 15a) that vegetables, fruit, food from contaminated soil, milk, etc. will be contaminated; (R. 15a) that plaintiffs and their lands and their families will be injured in eight different ways (para. 10); and (R. 17a) that plaintiffs have no adequate remedy at law; and (R. 17a) they pray judgment "for such damages as plaintiffs shall cause thereby if defendants shall not have refrained therefrom". Plaintiffs submit that the original complaint, at least, laid an ample foundation for the recovery of damages, especially since that relief is merely incidental in this single, unified cause of action for injunctive relief.

(b) Before the trial, but after the 1957 spraying, and long before certain allegations were *added* to the complaint to conform to the evidence, both defendants served interrogatories (R. 3282 to 3287, 12/18 and 12/23, 1957, 8a) as follows:

> "2. • • • state separately how he or she has been damaged by the 1957 program. • • •
>
> "3. Set forth an exact, itemized and detailed statement showing the nature, character and extent of such damage, and giving an itemized account of the extent of such damage in monetary terms."

Accordingly, on January 13, 1958, the plaintiffs Richards, Spock, Weekes, Homer (R. 3378 to 3386), and plaintiffs Belt and the Reuschles (R. 3387 to 3393) filed sworn answers specifying their damages in great detail (15 pages) fully apprising defendants as to their claim of incidental damages, upon which the issue was thereupon clearly drawn. The other plaintiffs did likewise in three separate documents on January 21, 24 and 31, 1957 (R. 3406 to 3416, 10 pages).

(c) Nine of the plaintiffs testified at length on various days of the trial (Belt, R. 157a; Berens, R. 211a;

Jacobs, R. 141a, 1412; Kennedy, R. 104a; Murphy, R. 38a, R. 175; Roosevelt, R. 196a, 1521; Spock (for herself and Richards) R. 183a, 1438, 2595; and Weekes, 136a. The plaintiff Nichols' damages were shown by her "cow-man" Poulouin, R. 198a and R. 159a, and by her chemist, Truhlar, R. 113a and R. 269a; and by the admissions and testimony in behalf of the defendants, R. 302a, 303a, 215a.

(d) Most of plaintiffs' personal testimony (as above) concerned their actual damages; most of it was insusceptible of expert pecuniary measurement. Each was thoroughly cross-examined upon a damage issue thus clearly joined.

(e) Defendants' counsel, despite the fact that the damage testimony occupied many days of the trial and hundreds of pages of the record, did not once object upon the ground that a sufficient basis for incidental damages had not been established by the pleadings.

(f) Plaintiffs' Summation Brief, filed well before the taking of evidence had been terminated, summarized the damages for the plaintiffs Nichols, Kennedy, Weekes, Jacobs, Roosevelt, Belt, Spock and Richards in considerable detail (8 pages, pp. 26 to 34); and demanded judgment for

> "• • • incidental damages to be determined by a master."

(g) On this appeal plaintiffs went to an expense of several hundred dollars in printing, in the Appendix, the testimony and exhibits as to the damages of the individual plaintiffs.

(h) In their Appellants' Brief (e.g., at pages 5, 9, 11, 12, 13, 14, 18, they stressed the damages already sustained, and urged a remand for findings as to those and other relevant facts. As further indicating that

there has been no intimation of abandonment of the claim for incidental damages, the Reply Brief (plaintiffs' last expression) again asks for findings as to damages (pp. 1, 2 and 3); and argues at length for such an award (pp. 14 to 17), especially as to Mrs. Nichols' contaminated dairy soil and milk (pp. 17 to 19).

(i) The Court's statement that "the amended complaint (sic) contains no reference to damages" overlooks the fact that there *was* no amended complaint, but merely allegations added to the original complaint (21a). The original complaint was considered sufficient in an injunction action, and the defendants, after being fully apprised as to the details of the incidental-damages claim, had joined and fully tried that issue. (The added allegations concerned other matters not so previously particularized.)

(j) There is but a single cause of action, i.e.; in equity, for injunctive relief, to restrain acts which are *threatened*, but not yet done. The damages, if injunctive relief, because of subsequent events which are not the fault of the plaintiffs, becomes moot, are merely incidental, though the awarding of them, if defendants' acts were illegal, is a vital part of complete equitable relief (see cases below cited).

(k) *If, despite the foregoing, it still be held that damages have not been adequately pleaded, plaintiffs NOW again ask leave, under Rule 15(b), "even after Judgment", to amend so as to conform not only to the evidence, but to the detailed answers to defendants' interrogatories.*

POINT V

The Court of Appeals has rendered a decision in conflict with decisions of the Court of Appeals for the Seventh and Ninth Circuits and the decision of this Court, in that it has refused to remand the case to the District Court for adequate findings.

We believe that we have shown abundantly in our Statement (*supra*) that the questions of fact inescapably involved in the determination of the diversified damages sustained by the several plaintiffs, as well as facts bearing on the unlawfulness of the defendants' acts, are facts on which the District Court refused to make any findings pro or con.

Insofar as findings were a necessary factor in the ruling that the case became moot as to injunctive relief, the Court of Appeals undertook that function (App. "B" pp. 11a, 12a) in direct conflict with the decisions of the Court of Appeals for the Ninth Circuit in *Deering* v. *Modern Aire Co.*, 231 Fed. (2) 623, 627 and of this Court in *U. S.* v. *Causby*, 328 U. S. 256, 267 and *Kelley* v. *Everglades Dist.*, 319 U. S. 415, 420, 422, and *U. S.* v. *Esnault-Pelterie*, 299 U. S. 201, 205, 206, holding that it is not the function of an Appellate Court to search the record and make findings.

Insofar as the Court of Appeals and the District Court have purported to refer to facts in their opinions, which are not stated in the formal findings, reliance thereupon is in conflict with the decision of the Court of Appeals for the Ninth Circuit in *Ohlinger* v. *U. S.*, 219 Fed. (2) 310 and *Bank of Madison* v. *Graber*, 157 Fed. (2) 137, 141, as well as the decision of this Court in *Stone* v. *U. S.*, 164 U. S. 380, and *U. S.* v. *Causby* (*supra*).

Insofar as the decisions of the Court of Appeals and the District Court are based upon statements that plaintiffs have not shown damages and that the plaintiffs have not shown the likelihood of the repetition of the trespasses, they are in conflict with the decision of the Court of Appeals for the Seventh Circuit in *Kweskin* v. *Finkelstein*, 223 Fed. (2) 677, at p. 679, holding that a finding that plaintiff fails to prove a fact is not a finding of fact, and certainly not a finding that the fact does not exist.

The practical injustice resulting from these procedural departures with respect to the mandatory requirements of findings is abundantly shown in our Statement (*supra*).

POINT VI

The Court of Appeals has without justification refused to adjudicate an important constitutional question which has not been, but should be, settled by this Court, affecting the health and welfare of all.

No judicial authority can be found upholding the validity of any statute, as within the police power, which expressly empowers officers to do any such things as those defendants are doing, to accomplish any such "public objective" as they announce. The extreme in the tree-protecting field, the "farthest north" reach or reachable, is the Virginia statute which was narrowly upheld by the Supreme Court in *Miller* v. *Schoene*, 276 U. S. 272, affirming 146 Va. 175, 135 S. E. 813. But that does not come within a thousand miles of justifying, as within the police power, Section 164 of the New York Agriculture and Markets Law, subdivision 1, construed as the trial court construes it.

It is reasonable to assume that *Miller* v. *Schoene* represents the maximum. If any court decision had ever gone

further, the defendants and the trial court would have cited it. Because of the striking *contrast* between that case and this, it is itself a compelling brief for appellants. Among the contrasting features the following stand out:

	Miller v. *Schoene*	*Case at Bar*
1.	Only infested private lands are invaded (p. 277).	Uninfested private lands are invaded.
2.	Only infected or host trees destroyed (p. 278).	Vegetables above-ground and fruit made inedible by kerosene; soil contaminated with DDT; milk illegally contaminated for many months.
3.	Ten-freeholder request, and state entomologist's certificate are pre-requisite (p. 278).	No pre-requisites; protests ignored.
4.	Advance notice required, and prior court hearing permitted (pp. 278, 281).	No notice; no prior hearing.
5.	Target pest (cedar rust) attacks *food* (apple) trees; "one of the principal agricultural pursuits in Virginia" furnishing employment for a large portion of the population (p. 279).	Gypsy moth attacks only forest (shade) trees, not food trees or food plants.
6.	Value of red cedar trees "small as compared with that of the apple orchards of the state" (p. 279).	Central Long Island lies near N. Y. City, and "according to the USDA is, 'one vast *vegetable* garden * * * the most intensively cultivated and productive tract of land, in the eastern United States'" (International Encyc., Vol. 14, p. 349).

Miller v. *Schoene*	*Case at Bar*
7. Measures against cedar rust do not reach the bodies or even the clothing of human beings.	Kerosene in the face irritates for weeks; spoils clothes; DDT's effect on health and future health still debatable; except as to milk.
8. Cedar rust measures permitted only if apple orchard is within two miles of infected or host cedar trees (p. 278).	No limit on distance of trees to be protected from gypsy moth; in this case admittedly hundreds of miles away, in *other states;* there admittedly being no substantial de-foliation on Long Island.
9. *Time* immediacy, because of "dangerous proximity", constituting a "menace", justifying exercise of police power (pp. 278, 279).	Danger to woodlands admittedly "speculative" and remote in time, as well as distance.
10. Measures shown without dispute to be effective, and the only effective measures, to meet the public need.	Sharp difference among scientists as to effectiveness of "eradication" and as to need for it, in view of natural, biological control.

In narrowly upholding the Virginia statute the Supreme Court stressed every single one of the features listed in the left-hand column, in effect making each a *sine qua non* of its validity; and thereby, we submit, furnishing a *standard* by which the validity of *all* tree-protecting state statutes is to be determined, vis-a-vis the 14th Amendment and the police power of the state. While *Miller* v. *Schoene* involves state police power in protecting *trees*, it manifests the need for the presence of factors pre-requisite to the exercise of police power in any and all cases where private rights are to be subordinated to the alleged public need.

We respectfully submit that we have shown in our Statement and in the foregoing Points that the refusal of the Court of Appeals, especially in view of its footnote (App. "B", p. 13a), to decide the foregoing important question was unjustified.

Indeed, the Court of Appeals, in its decision in this case, itself prescribed the same sort of safeguards as those provided in the Virginia statue narrowly upheld in *Miller* v. *Schoene*, when it said in its footnote (App. "B", p. 13a):

> "Of course, if complaint were made again, regarding a further spraying program, it would be the duty of the district court to re-examine the proposed practices and procedures for carrying out the spraying * * *. It would seem well to point out the advisability for a district court, faced with a claim concerning aerial spraying or any other program which may cause *inconvenience and damage* as widespread as this 1957 spraying appears to have caused, to inquire closely into the methods and safeguards of any proposed procedures so that incidents of the seemingly unnecessary and unfortunate nature here disclosed may be reduced to a minimum, assuming, of course, that the government will have shown such a program to be required in the public interest."

But unfortunately, unless set forth in the authorizing statute, the safeguards become *moot* before any effective remedy is available, under the position taken by the lower courts herein. For, in the event of any future threatened air-spraying against the gypsy moth or any other pest, the case will have become moot before it comes to a hearing when the Court of Appeals footnote admonition can be considered.

Separate damage actions by hundreds of small holders do not furnish an adequate remedy to the unoffending and protesting inhabitants.

In this petition, this Court is being asked to consider the rights of all persons whose health and welfare—perhaps even their lives—may be threatened by future sprayings of poisonous insecticides by public officials acting without semblance of right or authority conferred by law.

The issues involved in this case affect not only the thirteen plaintiffs who have suffered actual damages but every man, woman and child in the United States.

Plaintiffs, in the bringing of this suit, in their appeal from the District Court, their petition for rehearing in the Court of Appeals, and in this petition, at substantial expense, are performing a public duty as citizens, as well as protesting in their own behalf, and are endeavoring to protect the health and gardens not only of themselves but the entire population.

This Court will, we assume, take judicial notice of the fact that this case has been profusely reported in dailies, weeklies and monthlies of all types of interest, as confirming our insistment that alleged mootness should not bar its adjudication upon the merits as vitally affecting the "public interest" (see *U. S. v. W. T. Grant Co.*, 345 U. S. 629, quoted at p. 26 *supra*).

The deliberate disregard of plaintiffs' rights by the defendant officers and the complete lack of official or legal justification of their trespasses and assaults, and the inevitability of damage therefrom, appears shockingly from

the testimony of the defendants themselves and their own witnesses. The substantial and varying damages actually caused to the plaintiffs and other residents is shown by undisputed testimony. Yet the District Court refused to make, and the Court of Appeals, to require, findings of fact, pro or con, as to innumerable constituent facts without which no determination of mootness, damages or the merits could be made (R. 342a to 354a).

CONCLUSION

Upon the foregoing grounds, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

Statutes Involved

1. Section 102 of the Department of Agriculture Organic Act of 1944, 58 Stat. 735, as amended, 7 U.S.C. 147a, provides:

> § 147a. *Control and eradication of pests and plant diseases; cooperation of States and farmers' associations; definition of State; rules and regulations; appropriations*
>
> (a) The Secretary of Agriculture either independently or in cooperation with States or political subdivisions thereof, farmers' associations, and similar organizations, and individuals, is authorized to carry out operations or measures to eradicate, suppress, control, or to prevent or retard the spread of Japanese beetle, sweetpotato weevil, Mexican fruitflies, citrus canker, gypsy and brown-tail moth, Dutch elm disease, phnoy peach and peach mosaic, cereal rusts, corn borer, pink bollworm and thurberia weevil, citrus blackfly, white-fringed beetle, wheat-stem sawfly, Oriental fruitfly, and Hall scale: *Provided*, That the Secretary of Agriculture is further authorized to cooperate with the Government of Mexico or local Mexican authorities in carrying out necessary surveys and control operations in Mexico in connection with the eradication, suppression, control, and prevention or retardation of the spread of Mexican fruitflies, citrus blackfly and pink bollworm and thurberia weevil. In performing the operations or measures herein authorized, the cooperating foreign country, State, or local agency shall be responsible for the authority necessary to carry out the operations or measures on all lands and properties within the foreign country or State other than those owned or

controlled by the Federal Government and for such other facilities and means as in the discretion of the Secretary of Agriculture are necessary. As used in this section, the term "State" includes the District of Columbia and the Territories and possessions of the United States.

(b) The Secretary of Agriculture is authorized and directed to promulgate such rules and regulations and use such means as he may deem necessary to provide for the inspection of domestic plants and plant products offered for export and to certify to shippers and interested parties as to the freedom of such products from injurious insect pests and plant diseases according to the sanitary requirements of the foreign countries to which such products may be exported.

• • • • •

2. Section 58 of the New York Conservation Law (L. 1923, c. 54; L. 1928, c. 242; L. 1933, c. 212; L. 1949, c. 191, provides as follows:

§ 58. *Control and prevention of gypsy moth and other forest insects*

For the purpose of control and preventing the spread of the gypsy moth and other forest insects the following provisions shall apply:

1. The department may enter into cooperative agreements with any other state, the federal government, any foreign government or private individuals in order to obtain proper working agreements.

2. The department may accept and expend gifts of money for control and prevention work.

3. The department may conduct necessary investigations for the purpose of discovering better methods of control or prevention of spread of gypsy moth and other forest insects either within or without the state.

4. Duly authorized agents of the department may enter upon any lands for the purpose of determining if such property is infested with the gypsy moth or any other forest insects, and the extent of such infestation.

5. The department shall have the authority by order to establish quarantine districts in any part or parts of the state, and to prohibit the movement of materials which may be harboring the gypsy moth or other forest insects in any of their different forms. On the making of such an order, the department shall cause a certified copy of the same to be filed in the office of the clerk of each county, affected by such quarantine, and shall give such other notice thereof as it may deem necessary. Such order shall be effective on and after the tenth day from the filing thereof.

6. The department shall have discretionary authority to poison forest areas in or near sections infested by insect pests.

7. The department may take steps to establish barrier or protective zones for the purpose of preventing the spread of forest insect pests, and in so doing shall have the authority and right to enter upon private lands for this purpose, and thereon make such modifications in the composition of the forest growth as it may deem necessary. In such barrier or protective zones trees or other vegetation may be sprayed, cut, destroyed or otherwise treated when

in the judgment of the department, the same may be necessary, but the owner of the property shall be entitled to a just compensation for damage done through the acts of such agents, except that no compensation shall be paid for the destruction of infested trees.

8. The department shall have power to ascertain the amount of damage done upon lands of private owners by the acts of the agents of the department in establishing and maintaining barrier zones, by having an agent of the department appraise the same. If the owner is not satisfied with the amount of damage as fixed by such appraisal, within six months after serving of a copy of such appraisal, he may take an appeal therefrom to the court of claims, which court is hereby authorized to pass upon the questions involved and determine the amount due such owner.

• • • • •

3. The caption and introductory sentence, and subdivision 1 of the foregoing Section 58 of the New York Conservation Law were amended (L. 1953, c. 601; L. 1954, c. 95) to read as follows:

§ 58. *Control and prevention of forest insects other than white pine blister rust and currant rust*

The term "forest tree diseases", as used hereafter in this section, does not include white pine blister rust and currant rust particular provision for which is made in section fifty-seven-a of this chapter.

For the purpose of control and preventing the spread of forest insects and forest diseases the following provisions shall apply:

Appendix "A"—Statutes Involved

1. The department (Department of *Conservation*) may enter into cooperative agreements with any other state, the federal government, any foreign government, any municipal subdivision of New York State or private individuals in order to obtain proper working agreements.

(Subdivisions 2 to 7 remain unchanged.)

NOTE: The mass air-spraying against the gypsy moth here involved is *not*, however, done by the federal officer in cooperation with the State of New York through the State's Department, or Commissioner, of Conservation, but in co-operation with the State's Department, and Commissioner, of Agriculture and Markets, purportedly pursuant to the next-quoted New York statute. (See answer of the defendant Commissioner Carey (R. 30a); and Finding No. 10, R. 33a; and Conclusion No. 6, R. 335a.)

4. Section 164 of the New York Agriculture and Markets Law (Subd. 1, 2 and 3) (L. 1927, c. 212) provides as follows:

§ 164. *Control and eradication of injurious insects and plant diseases*

1. The commissioner shall take such action as he may deem necessary to control or eradicate any injurious insects or plant diseases existing within the state.

2. All trees, shrubs, plants and vines or other material infected or infested with injurious insects or plant diseases, or which have been exposed to injurious insects or plant diseases, or which are hosts of such plant diseases, are hereby declared public nuisances and may be destroyed or ordered destroyed by the commissioner.

3. The commissioner may order the owner or person in charge of any infected or infested trees, shrubs, plants and vines or other material or host plants, or the owner or person in charge of the farm or premises upon which they have been grown or on which they exist or in which they have been stored, or of the vehicles or cars in which they have been conveyed, to take such measures to eradicate or control the said infestation or infection as the commissioner may deem necessary or proper. Such orders may be communicated by personal service, service through the mails, or by newspaper publication, as the commissioner deems expedient. Such owner or person in charge shall promptly carry out the order of the commissioner within the period of time designated in the order. If such owner or person in charge shall refuse or neglect to carry out any such order, the commissioner may apply such eradication or control measures at the expense of the owner. Upon the completion of such eradication or control measures the owner shall, upon demand of the commissioner, forthwith pay the cost thereof into the state treasury, and upon his neglect or refusal so to do, the amount thereof shall be recovered in a civil action to be brought and prosecuted by the attorney-general in the name of the people of the state. Added L.1927, c. 212, § 2, eff. March 21, 1927.

5. Section 1331 of Title 28, U. S. Code provides as follows:

The District Courts shall have original jurisdiction of civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive

of interest and costs, and arises under the Constitution, laws or treaties of the United States.

6. The Fifth Amendment of the Constitution of the United States provides in part as follows:

> No person shall • • • be deprived of life, liberty or property without due process of law • • •.

7. The Fourteenth Amendment of the Constitution of the United States, subdivision 1, provides in part as follows:

> • • • nor shall any state deprive any person of life, liberty or property without due process of law.

8. The Opinion of the Attorney General of the State of New York (December 28, 1955, page 152), to the Department of Agriculture and Markets, provides, in pertinent part, as follows:

> "I am of the opinion that you do *not* have the authority to enter into the proposed cooperative agreement with United States Department of Agriculture for the proposition of engaging in a joint program to control the spread of the Golden Nematode disease. For this reason, consideration should, however be given to *amending* Laws of 1947, Chapter 663 to provide the *specific statutory* authority for you to enter into the agreement • • •. (Emphasis added)

9. Section 1 of Chapter 817 of the Laws of New York, 1956, provides in pertinent part as follows:

> *Potatoes—Golden Nematode Disease*
>
> Section 1. Chapter six hundred sixty-three of the laws of nineteen hundred forty-seven, entitled "An

act making provision for the control and eradication of the golden nematode disease of potatoes, prescribing the powers and duties of the commissioner of agriculture and markets in connection therewith * * *" is hereby amended by inserting therein a new section, to be section six-a, to read as follows:

Sect. 6-a. The commissioner may also enter into agreements on behalf of the department of agriculture and markets with the United States department of agriculture * * * which he deems necessary, for the purpose of engaging in a joint, cooperative, scientific and operating program for the benefit of the people of the State of New, to control, eradicate and prevent the spread of the golden nematode disease.

APPENDIX "B"

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 270—October Term, 1958.
(Argued April 21, 1959 Decided October 1, 1959.)
Docket No. 25448

ROBERT CUSHMAN MURPHY *et al.*,

Plaintiffs-Appellants,

—v.—

EZRA TAFT BENSON, Secretary of Agriculture of the United States,

Defendant,

—and—

LLOYD BUTLER, Area Supervisor, Plant and Pest Control Division of the United States Department of Agriculture *et al.*,

Defendants-Appellees.

Before:

LUMBARD, *Circuit Judge,*
GALSTON and ANDERSON, *District Judges.*

Plaintiffs appeal from a judgment of the United States District Court for the Eastern District of New York, Walter Bruchhausen, *J.*, 164 F. Supp. 120, dismissing their

suit for an injunction and damages resulting from the spraying of their property as part of a government program to eradicate the gypsy moth.

Judgment with respect to the injunction vacated, with direction to dismiss as moot. Judgment with respect to damages affirmed.

ROGER HINDS and VINCENT A. KLEINFELD, New York, N. Y. (Frank C. Mebane, Jr., and William J. Cahill, New York, N. Y., on the brief), *for plaintiffs-appellants.*

LIONEL KESTENBAUM, Department of Justice, Washington, D. C. (George Cochran Doub, Assistant Attorney General, Cornelius W. Wickersham, Jr., United States Attorney, and Alan S. Rosenthal, Department of Justice, on the brief), *for defendant-appellee Butler.*

IRVING L. ROLLINS, Assistant Attorney General of the State of New York (Louis J. Lefkowitz, Attorney General, and Paxton Blair, Solicitor General, on the brief), *for defendant-appellee Carey.*

LUMBARD, *Circuit Judge*:

Robert Cushman Murphy and six other home-owners in Nassau and Suffolk Counties, New York, brought this action

in May of 1957 to enjoin the defendants, officials of the United States and the New York State governments from spraying their properties with DDT in solution as part of a federal government program to spray aerially Nassau and Suffolk Counties for the purpose of eradicating the gypsy moth. The plaintiffs' bill alleged that the government activities purportedly authorized by Section 102 of the Department of Agriculture Organic Act of 1944, 58 Stat. 735, as amended, 7 U. S. C. Section 147a (1958), and the New York Agriculture and Marketing Code Section 164, would deprive them of property without due process of law in contravention of the Fifth and Fourteenth Amendments to the Constitution, and constituted a common-law trespass. In addition to the prayer for an injunction, the bill sought damages for such harm as might result to the plaintiffs from the spraying, if the program were carried out. Later the same month, Judge Byers, upon affidavits and after hearing argument, denied a motion for a preliminary injunction. 151 F. Supp. 786. From this denial of a preliminary injunction no appeal was taken.

During June of 1957, the spraying program was conducted over the counties of Nassau and Suffolk, including the properties of the plaintiffs. Subsequently, the case was tried during February and March of 1958 before Judge Bruchhausen who dismissed the complaint in June, 1958. 164 F. Supp. 120. The trial judge held, *inter alia*, that no legal rights of the plaintiffs had been violated and that the plaintiffs had not shown that they had suffered damage by reason of the spraying. We find it unnecessary to reach the merits of the plaintiffs' claim for injunctive relief. The 1957 spraying program, which precipitated this suit, has been completed and the record amply indicates the un-

likelihood of a future aerial spraying in the area of plaintiffs' property. We, therefore, hold the question of granting injunctive relief to be moot and direct the dismissal of so much of the bill as seeks such relief.

United States Department of Agriculture officials testified at trial that their program called for only one major aerial spraying. Follow up treatment was to be on a local basis where field investigation showed that moth egg masses had not been totally destroyed. By what means the follow up might be carried out was uncertain and dependent upon future research with various chemicals and methods of ground and aerial spraying. Furthermore, Department officials testified that a single spraying by air has proved entirely effective in other parts of the Eastern United States and additional aerial sprayings have not been necessary. The trial judge stated in his opinion and in his findings of fact that it seemed unlikely that there would be further aerial spraying on Long Island in light of the effectiveness of the 1957 campaign, and the record amply supports those findings.

It is true that Department officials could not state with certainty at trial that further aerial spraying would never be necessary, but the mere possibility that at some future date conduct similar to that engaged in by the defendants in the past may again be contemplated is not sufficient to prevent a dismissal for mootness. *Norwegian Nitrogen Products Co.* v. *Tariff Commission*, 274 U. S. 106 (1927). In the *Norwegian Nitrogen Products* case, the plaintiff, claiming a right to a hearing before the Tariff Commission, sought to enjoin its investigation. While the suit was pending, the investigation was completed, and the Commission's recommendation was sent to the President. The Supreme

Court, in vacating the decision below with directions to dismiss as moot, reasoned:

> The Commission has filed its report with the President and the President has made his decision and proclamation fixing the revised tariff. Either may revive the investigation but neither is under a duty to do so. Assuming that the plaintiff is entitled to a hearing of the character demanded whenever an investigation is had, which we do not decide, it would be an idle ceremony to require such a hearing upon an investigation which we may not command and which may never be made. 274 U. S. at 111-12.

This reasoning applies to the situation presented by the record in this case. Plaintiffs may not require the court to determine their legal rights under a set of circumstances which it appears probable will not arise again. Plaintiffs' constitutional claim is based primarily on the manner in which the 1957 spraying program was conducted. It appears from the record that the technique to be employed in any further spraying, wherever it may be, will be redetermined in each case.[1]

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1 Of course, if complaint is made again, regarding a further spraying program, it would be the duty of the district court to reexamine the proposed practices and procedures for carrying out the spraying in the light of available techniques and aircraft and the circumstances then prevailing. But remote as we believe a possible recurrence of spraying these areas to be, it would seem well to point out the advisability for a district court, faced with a claim concerning aerial spraying or any other program which may cause inconvenience and damage as widespread as this 1957 spraying appears to have caused, to inquire closely into the methods and safeguards of any proposed procedures so that incidents of the seemingly unnecessary and unfortunate nature here disclosed, may be reduced to a minimum, assuming, of course, that the government will have shown such a program to be required in the public interest.

Appendix "B"
Opinion of the United States Court of Appeals

Cases such as *United States* v. *W. T. Grant Co.*, 345 U. S. 629 (1953), and *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290 (1897), relied upon by the plaintiffs, are not in point. These cases, in which contentions of mootness were rejected, concerned illegal courses of conduct discontinued because of the commencement of prosecution, and likely to be reinstituted upon a dismissal. The acts involved in the present case were discontinued because they had achieved their objective, and the evidence indicates little likelihood of their repetition. Motives of self-interest, which were highly influential factors in the formation of the Court's conclusion that the illegal conduct in *W. T. Grant* and *Trans-Missouri* would probably be renewed, are not present here. Nor is the plaintiffs' position supported by cases dealing with government activities periodic in nature, and certain to be repeated, such as *Southern Pac. Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 515 (1911).

There remains for consideration plaintiff's claim for damages. We note that since the prayer for injunctive relief must fail for mootness, there is a question whether the federal court retains jurisdiction over the damages claim, either as an independent federal cause of action or as a claim pendant to that for injunctive relief. We do not need to decide this question, since in any event the plaintiffs are not entitled to damages on the record before us.

We agree with the district judge that the plaintiffs have failed to prove what damages, if any, they have suffered by reason of the spraying. Further, we think that plaintiffs' counsel, by the conduct of their case at trial and by their amended complaint, clearly indicated an intention to aban-

don the claim for damages in this case. The original complaint, filed prior to the spraying, contains only a single, general reference to the claim for damages, without any indication of what their nature or amount might be, and the amended complaint, filed subsequent to the spraying and subsequent to the completion of the trial in order to conform to the evidence, contains no reference at all to the damage claim or the amount of damages sought. In addition, the trial record contains no testimony, expert or otherwise, as to the amount of damages suffered by the plaintiffs.

The judgment of the district court with respect to the injunctive claim is vacated and the cause is remanded with instructions to dismiss the prayer for injunction as moot. The judgment with respect to the claim for damages is affirmed.